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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

PATRICIA LAWSON,

Petitioner,

vs.

ROBERT LAWSON,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals (First Appellate District, CA) Division Five

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an "anti-bankruptcy clause" in a state court order for spousal support/community debt repayment violates the "fresh start" policy of the Bankruptcy Act (11 USC 101-1330 et seq.) such that federal pre-emption (or the Supremacy Clause) makes the judgment void (or voidable ab initio).

Discussion/Opinion Below

a. The court below ruled that a violation of public policy is not equivalent to a jurisdictional error, so as to permit collateral attack on a final judgment, citing ***Armstrong v. Armstrong*** (1976) 15 Cal.3d 942 and ***Moffett v. Moffett*** (1980) 27 Cal.3d 645. However, neither ***Armstrong*** or ***Moffett*** involved a federal question, to wit; the federal bankruptcy pre-emption and the Supremacy Clause, instead, both of the above-cited cases involved violations of state law policy, thus, collateral attack should have been permitted, and the offending order should have been held void (or voidable ab initio).

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT DIVISION FIVE

Patricia Lawson respectfully petitions for a Writ of Certiorari to review the opinion of the California Court of Appeal, First Appellate District, Division Five (case number A088191).

OPINION BELOW

The opinion of the California Court of Appeal is attached hereto as Appendix A.

JURISDICTION

This court has jurisdiction over the present action under the Supremacy Clause, as expressed in Article VI of the Federal Constitution, which provides as follows:

> "This Constitution and the laws of the United States, which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." 16 Am.Jur.2d Constitution Law §70, et seq. at §288, et seq.

In addition, this court has jurisdiction under the Federal Bankruptcy Act, 11 USC 101-1330, et seq.

STATUTORY AND CONSTITUTIONAL ISSUES INVOLVED

This petition involves the question of whether the "fresh start" policy embodied in the Bankruptcy Act, 11 USC 1330 et seq., and the Supremacy Clause of the United States Constitution, i.e. Article VI thereof, prohibit a state court judge from issuing a spousal support/debt repayment order that is designed to preclude a party from availing themselves

of the benefits and protections of the Bankruptcy Act, 11 USC 1330 et seq., and, further, to what extent such orders are void ab initio, or merely voidable.

STATEMENT

This appeal arises from post-judgment proceedings for modification of child and spousal support. After their 14-year marriage was dissolved in 1991, ROBERT and PATRICIA LAWSON litigated the issues of child custody and support, spousal support, and division of community property and debt. In January, 1994, the trial court (Humboldt County Superior Court) issued its Order on Reserved Issues, including therein an "anti-bankruptcy" spousal support/debt repayment order as follows:

> "Husband shall be entitled to reimbursement from (Wife) as and for the payment of, or assumption of responsibility to pay, the community debts...in the sum of $58,701.85. As and for permanent spousal support, the sum of $900 per month is due from (Husband) to (Wife). Of this sum, $800 shall be paid by retention by (Husband) as set forth...herein. The remaining $100 per monthly shall be paid to (Wife) through the Humboldt County District Attorney Family Support Division...In establishing spousal support in the sum of $900 per month, the Court finds that (Wife) needs support in this amount so as to be able to reimburse (Husband) to the extent of $800 per month, as, and for, the assumption by (Husband) of the community debts. Likewise, the Court finds that (Husband's) ability to pay spousal

> support in the sum of $900 per month is based in part upon (Husband) being able to offset $800 per month, as, and for, reimbursement for his assumption of community debt. Should the arrangement whereby (Husband) is entitled to offset $800 per month cease, before all reimbursement due (Husband) is paid, (Husband's) ability to pay spousal support shall be limited to $100 per month and (Wife's) need for spousal support shall be reduced to $100 per month and the spousal support will be reduced from $900 per month to $100 per month."

The First District Court of Appeals (Division Five) held as follows:

> "We cannot review the 1994 order. First, Wife has not made clear to us exactly how the order prevented her from filing for bankruptcy, and, indeed, Wife's assertion is belied by the fact that Wife actually succeeded in discharging her unpaid obligation to Husband for community debts.[1] In any event, *even if we were to conclude that the 1994 order violated the public policy embodied in the bankruptcy laws, allowing debtors to make a fresh start*, a violation of public policy is not equivalent to

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[1]This occurred two years later, i.e. in 1996, thus, Wife was dissuaded from filing bankruptcy (for that period of time). Actually, *wife was able to discharge only the unpaid indebtedness to the time of notice to husband*, which required her to reopen/amend her bankruptcy in 1998 to include husband as a creditor therein. (our footnote)

a jurisdictional error so as to permit a collateral attack on a final judgment. (*Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 950-951 [erroneous reduction of child support based on children's independent assets, although against public policy, not a jurisdictional error].) The errors of which Wife complains constitute, at most, a mistaken application of law, not an act beyond the power of the court. Consequently, the 1994 judgment cannot be collaterally attacked even if it was erroneous. (*Ibid.*; see also *Moffat v. Moffat* (1980) 27 Cal.3d 645, 675-658 [erroneous abatement of child and spousal support as remedy for refusal to permit visitation].)" (opinion below, p. 8, Appendix A hereto)

REASONS FOR GRANTING THE WRIT

1. Not only did this 1994 family court order violate the public policy embodied in the Bankruptcy Act, 11 USC 1330 et seq., by allowing debtors a "fresh start", we contend that federal pre-emption (and the supremacy clause) make the judgment void (or voidable ab initio). These issues were presented to the California Supreme Court by way of a Petition for Review. In an En Banc decision filed January 10, 2001 (attached hereto as Appendix B), the Petition for Review was denied.[2]

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[2]The Petition should have been granted because California law fails to reconcile three important family law/bankruptcy related cases, to wit: *IRMO: Clements*

This court should grant this writ because the instant case presents a clear example of state family court judges fashioning remedies (for debt repayment), that conflict with, and violate, the congressional intent behind the Bankruptcy Act, to wit: the "fresh start" a debtor is entitled to.

In the instant case, the "anti-bankruptcy" provision entered by the Humboldt County Superior Court, was an example of judicial activism running afoul of the Federal Bankruptcy Act which not only penalized petitioner/wife by confiscating her spousal support for debt repayment, but was designed to prevent her from even filing bankruptcy (even though she had announced, to that same court, her intention

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(1982) 134 Cal.App.3d 737, which *permitted* a payor/spouse to reduce spousal support by the exact amount of monthly debt reduction occasioned by the payee/spouse's discharge of debt in bankruptcy, and *IRMO: Cohen* (1980) 105 Cal.App.3d 836 which held that the trial *court would not* assign to a bankrupt spouse any community debt that that spouse has discharged in bankruptcy (in accord *IRMO: Williams* (1984) at 157 Cal.App.3d 115 and *Boutte v. Nears* (1996) at 50 Cal.App.4th 162; the latter cases holding that federal pre-emption *precludes assigning or reassigning* to a bankrupt spouse *any community debt* that that spouse has discharged in bankruptcy, thereby upholding the supremacy of federal bankruptcy law over state court judgments.

to do so).[3]

I. THE DECISION BELOW CONFLICTS WITH THE FEDERAL BANKRUPTCY PRE-EMPTION

Generally, all debts to third party creditors are dischargeable in bankruptcy, CFLP, Bankruptcy §R69.0.1-0, 11 USC 502(a). The non-bankrupt ex-spouse remains liable for the debt discharged by the debtor spouse (i.e. even those that were assigned to the debtor in the dissolution). However, the non-bankrupt ex-spouse (who is paying spousal support to the debtor and who starts paying off the discharged debts in installments) may have the spousal support obligation off-set in the amount of the installments, *IRMO: Clements* (1982) 134 Cal.App.3d 737. However, in the more recent case of *IRMO: Williams* (1984) at 157 Cal.App.3d 1215, the court distinguished *Clements*, on the grounds that in the

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[3]In a Motion to Set-Aside the 1994 Order on Reserved Issues, specifically the Declaration of Patricia Lawson, in support thereof, provided (in pertinent part) as follows:

> "Further there was nothing in the court ruling indicating that Petitioner should be entitled to an $800 off-set in the event Respondent *alleviates herself from the responsibility of repaying the community debts by way of a bankruptcy petition*."

instant case, wife's obligation to husband to make an equalizing payment was part of a property division and not support.[4]

The *Williams* court stated that *Clements* is limited to cases with modifiable support provisions. In the instant case, the support provision was *an attempt at non-modifiability*, to wit: the Humboldt Court predetermined Patricia's future need for spousal support to be no greater than $100 per month, essentially making the provision non-modifiable.[5] *This was done for the express purpose of prohibiting Petitioner from availing herself of the "fresh start" policy in bankruptcy, which we contend preempts any state court policy and, further, runs afoul of the Supremacy Clause, i.e. Title VI, of the United States Constitution*.

In *Williams, supra*, the court held that the trial court cannot reassign debts discharged in bankruptcy to a bankrupt

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[4]In the case at bar, this was akin to Appellant's court-imposed obligation to remain responsible for 1/2 of the total community debt, i.e. a property/ debt division. (our footnote)

[5]This predetermination of Petitioner's future need was also against the public policy of California pursuant to *IRMO: Johnson* (1983) at 143 Cal.App.3d 57 (involving substantive step-downs in spousal support).

spouse. The court noted that then current Civil Code §4812, (now Family Code §3592), was limited to cases with modifiable spousal support provisions. This rationale was also set forth earlier in *IRMO: Cohen* (1980) at 105 Cal.App.3d 836, to wit: in keeping with the "fresh start" policy of the bankruptcy law, the *trial court may not reassign to a bankrupt spouse any community debt that the spouse has discharged in bankruptcy. The other spouse will be solely responsible for those debts.*

In *IRMO: Williams (supra)* the Husband filed an OSC Re: Contempt alleging that his former wife had not made an equalizing payment to him as provided for in their Marital Settlement Agreement. Between the time of the dissolution and Husband's Motion, Wife filed for bankruptcy. When Husband was notified of Wife's bankruptcy action, he gave the papers to his dissolution attorney who took no action. The Bankruptcy Court then discharged Wife's indebtedness to her husband (and the community debt that had been assigned to her). Husband then moved to have the trial court offset the amounts still due to Wife, against what she owed him, citing *Clements (supra)*. The trial court granted Husband's motion and ordered an offset of Wife's indebtedness to Husband (plus any amount Husband was required to pay

creditors on bills that Wife had been ordered to pay).

The Fifth District Court reversed, holding that the order permitting Husband to offset Wife's indebtedness, frustrated the purpose of the Federal Bankruptcy Act and violated the Supremacy Clause.[6] The reviewing panel said that although then current Civil Code §4830, now Family Code §290, and CCP §128 generally provided judges with inherent power to make orders necessary to effect judgments, the bankruptcy court's power to discharge debts that arose from a community property division (as opposed to a spousal support obligation - which is non-dischargeable), limits the trial court's power to order an offset. The court said that "despite the obvious inequities of allowing one spouse to discharge debts assumed in the dissolution-leaving the non-bankrupt spouse liable-the process is both well-recognized and not one easily circumvented by a trial court."

Out-of-state cases have generally followed *IRMO: Williams (supra)*. In *Benavides v. Benavides* (1983) 99 NM 535, a case directly on point, the New Mexico Supreme Court rejected an attempt to reassign a community debt in the guise

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[6]We agree with this holding and assert that orders such as the one in the instant case violate the Supremacy Clause, and are void or voidable *ab initio* (see further discussion, infra). (our footnote)

of spousal support. In that case, the dissolution judgment specified that no alimony would be paid to Wife, thus extinguishing her right to spousal support. A community debt was omitted from the property division portion of the judgment. After judgment was entered, Husband declared bankruptcy and discharged the omitted debt. The trial court modified the dissolution judgment *to award half the debt to Wife as alimony, but the New Mexico Supreme Court reversed, finding that if the judgment was a property order, it was dischargeable in bankruptcy.* If the judgment was for alimony (as the trial court had designated), **the court had exceeded its jurisdiction**[7] (see also CFLP, Bankruptcy, §R-57.1 and 62.5).

II. THE "SUPREMACY CLAUSE" CONTROLS THE INSTANT ACTION

The supremacy of the federal government is expressed in Article VI, of the Federal Constitution, as follows:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme

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[7]Thus, we contend the order was void not merely voidable. The California Court of Appeals (First District, Division Five) decision below, is antithetical to *Benavides*, supra.

> law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding. 16 Am.Jur.2d Constitutional Law, §70 et. seq., 288, et. seq."

Any state law, *however clearly within that state's acknowledged power*, which interferes with, or is contrary to, federal law must yield."[8] *Free v. Bland* (1962) 369 US 663, 82 S.Ct. 1089, 8 L.Ed.2d 180, 183. Before a state law can apply, several questions must be answered in the negative; (1) Does the state policy, in fact, conflict with the declared federal policy in whole or in part? If it does, then the state policy must yield under the Supremacy Clause, Witkin, Summary of California Law, 9th Ed., Constitutional Law, §8. Obviously the "anti-bankruptcy provision" at bar conflicts with the federal Supremacy Clause; the question is whether or not Congress intended to preempt the field with its policy, and, if so, the state policy must yield.

In the bankruptcy field, numerous cases attest to the federal preemption. In *Perez v. Campbell* (1971) 402 US 367, 91 S.Ct. 1704, 29 L.Ed.2d 233, it was held that a discharge in bankruptcy bars enforcement of local financial

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[8]See decision below, Appendix A hereto specifically page 8 thereto.

responsibility laws, in providing for suspension of drivers' licenses. In *Tracy v. Contractors' State License Board* (1965) 63 Cal.2d 598, 47 Cal.Rptr.561, 407, P2d 865, a provision in the Uniform Business and Professions Code making an adjudication in bankruptcy a cause for disciplinary action against a contractor, was held to be unconstitutional. In *Gene R.. Smith Corp. v. Terry's Tractor* (1989) 209 Cal.App.3d 951-954, 257 Cal.Rptr. 598, Federal Bankruptcy Law preempted state court actions for abuse of process and malicious prosecution (based on the filing of an involuntary bankruptcy petition); see also *Pauletto v. Reliance Insurance Company* (1998) at 64 Cal.App.4th 597, applying the *Gene R. Smith* case to voluntary bankruptcy proceedings, and *Sax v. Parilla, Hubbard, and Militzok* (1998) at 67 Cal.App.4th 565, 79 Cal.Rptr. 2d 120 following both the *Gene R. Smith* and *Pauletto* cases, supra.

In the case at bar, we contend that Judge Brown's ruling was specifically *designed* to preclude Appellant from filing any bankruptcy, and was void "ab initio". If the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of congress, under Article VI, ***the state law is preempted***. Even if the state law is generally compatible with the objectives of the federal

legislation, a court may determine that congress intended to foreclose state action. Constitutional Law, 3d Ed. Barron-Dienes, West Pub. Company (1995). The anti-bankruptcy clause at bar is clearly pre-empted by federal law.

III. COLLATERAL ATTACK ON A PREEMPTED JUDGMENT SHOULD BE PERMITTED.

(a) Collateral Attack Should be Permitted Where the Judgment Infringes on Congressional Authority.

The Second Restatement of Judgments and Conflict of Laws lists a number of situations in which the doctrine of res judicata may be rejected, and collateral attack allowed, as follows:

> "(a). Restatement 2d, Judgments §12: (1)The exercise of jurisdiction constitutes a manifest of abuse of authority; (2) *the judgment substantially infringes on the authority of another tribunal or governmental agency*; (3) the court lacks the capability to adequately determine its jurisdiction, and procedural fairness requires that it be subject to collateral attack." Witkin, Cal. Proc. 4th, Jurisdiction §338. (italicizing and underlining our emphasis)

In order to apply the above "test" to the order at hand, it is necessary to examine (segmentally) just what the Humboldt court was attempting to provide. We submit that it was attempting to provide the following:

> (1)A "straightjacket" on Patricia's spousal support, i.e. the **award** of $900 per month together with the **confiscation** of $800 therefrom (as debt repayment), *to insure the collection of ordinary civil debt*, (which is generally enforced by other means, i.e. Abstract of Judgment, Writ of Execution, etc.) (see California Family Code §900, 2023, 2551 and 2556, and California CCP §699.510, et. seq.), and further (and more glaringly), **to prevent Patricia from filing bankruptcy.**

The doctrine of rejecting res judicata and permitting collateral attack was recognized as early as *San Francisco v. Padilla* (1972) 23 Cal.App.3d 388, 100 Cal.Rptr. 223 and *Jackson v. Jackson* (1967) 253 Cal.App.2d 1026, 62 Cal.Rptr. 121. In *Jackson, supra*, the court stated,

> "This case presents appealing circumstances for divergence from the general rule because adherence to that rule would cause more, rather than less, litigation and would afford an opportunity for the re-litigation of matters which have already been fully contested and adjudicated between the parties. *The application of the rule under the circumstances of this case would defeat the ends of justice and the policy upon which the rule itself rests* (253 Cal.App.2d 1040)."

Another example of adoption of the "*Greenfield* test" (re: "special circumstances" permitting disregard of res judicata), occurred in *Hight v. Hight* (1977) at 67 Cal.App.3d 498; 136 Cal.Rptr. 685 where the court stated:

> "For res judicata to apply against a party he/she should have participated in the control of the action (citing *Minton v. Cavaney* (1961) 56 Cal.2d 576) and have been able to determine whether or not to appeal from an adverse judgment (67 Cal.App.3d 504). Thus, both the "ends of justice" and "important considerations of policy" would be defeated if the prior judgment were considered res judicata (67 Cal.App.3d 504). (See also *Mueller v. Walker* (1985) at 167 Cal.App.3d 600, 213 Cal.Rptr. 442)."

In the case at bar, the Humboldt County superior court used Petitioner's need for spousal support, (i.e. she needed all of the $900 to live on), as a basis for debt repayment, i.e. punishing her for the "spendthrift" ways of the community during marriage, **even after she had announced her intention to file bankruptcy**. Thus, the decision was specifically designed to delimit Patricia's future "control" over the case.

CONCLUSION

The decision below, if allowed to stand, permits state courts to enter "anti-bankruptcy provisions" in family law judgments thereby allowing state law to control an area subject to federal exemption. For all the foregoing reasons, Petitioner requests that this honorable court grant certiorari

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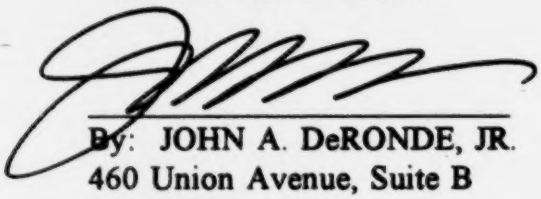
herein, and reverse the decision below.

Dated: 3-23-01

Respectfully submitted:

DeRONDE & DeRONDE



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Appendix A

NOT TO BE PUBLISHED IN OFFICIAL RECORDS

IN THE COURT OF APPEAL

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In Re the Marriage of ROBERT and PATRICIA LAWSON. **ROBERT LAWSON,**	
Respondent,	**A088191**
v.	
PATRICIA LAWSON,	**(Solano County Super. Ct. No.**
Appellant.	**S-F-033443-D)**

This appeal arises from postjudgment proceedings for modification of child support and spousal support. Appellant Patricia Lawson (Wife) primarily argues that upon the discharge in bankruptcy of the community debts, respondent, Robert Lawson (Husband) should have paid her additional sums as spousal support. We affirm the orders.

FACTUAL AND PROCEDURAL HISTORY

In 1991 the 14-year marriage of Robert and Patricia Lawson was dissolved, but the issues of child visitation and support, spousal support and division of community property were reserved for future decision. In January 1994 the trial court (Humboldt County Superior Court) issued its order on the reserved issues, granting custody of the two minor children to Wife with no visitation by Husband, awarding child support of $2,400 per month to Wife, and awarding the income tax exemption for the dependent children to Husband. The court also awarded the community debts of $117,403.69 to Husband and ordered Husband to pay $900 per month to Wife as spousal support with $800 retained as payment of Wife's one-half share of the community debts.[1] Wife was

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[1]The court's order stated in pertinent part: "[A.4. Husband] shall be entitled to reimbursement from [Wife] as and for the payment of or assumption of responsibility to pay the community debts...in the sum of $58,701.85 [¶]...[¶][B.1.] As and for permanent spousal support, the sum of $900 per month is due from [Husband] to [Wife]. Of this sum, $800 shall be paid by retention by [Husband], to be applied to reduce the amount of indebtedness of [Wife] to [Husband] as set forth...herein. The remaining $100 per month shall be paid to [Wife] through the Humboldt County District Attorney Family Support Division...[¶]...[¶] [B.5.] In establishing spousal support in the sum of $900 per month, the Court finds

unsuccessful in her request that the $800 monthly retention be stricken from the order. No appeal was taken.

At the time of the dissolution, Husband was an emergency room physician earning $12,584 per month. Wife was a student and unemployed.[2] Over time, Wife accumulated further debts, and in 1996 she filed for bankruptcy. She did not at that time, however, list her debt to Husband for her share of community debts.

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that [Wife] needs support in this amount so as to be able to reimburse [Husband] to the extent of $800 per month as and for the assumption by [Husband] of the community debts. Likewise, the Court finds that [Husband's} ability to pay spousal support in the sum of $900 per month is based in part upon [Husband] being able to offset $800 per month as and for reimbursement for his assumption of community debt. Should the arrangement whereby [Husband] is entitled to offset $800 per month cease before all reimbursement due [Husband] is paid, [Husband's] ability to pay spousal support shall be limited to $100 per month and [Wife's] need for spousal support shall be reduced to $100 per month and the spousal support will be reduced from $900 per month to $100 per month."

[2]In the Humboldt County proceedings, Husband objected to paying any spousal support, arguing that Wife was fully employable and her sporadic attendance at university classes should be no excuse for not working.

In September 1997 Husband moved for modification of the visitation of support orders. By stipulation, the venue was changed to Solano County, where Wife now lives. Husband argued that Wife was self-supporting and spousal support should be terminated. Further, Husband asked for a reduction in child support. In response, Wife acknowledged that she had become a licensed real estate agent, but she asserted that she was still in need of spousal support.

In October 1997 Wife filed her own motion for modification of child support and spousal support and for a determination of spousal support arrearages in light of Wife's bankruptcy. Wife argued that the $800 retention provision within the 1994 order was invalid and that she should be awarded $43,200 in arrearages (apparently calculated at $800 per month from December 1993).

The hearing on the cross-motions was not held until June 1998. In the meantime, in February 1998 Husband filed for bankruptcy and discharged his obligation for the community debts. Soon thereafter, Wife reopened her bankruptcy and obtained a discharge of the remaining unpaid debt to Husband. The bankruptcy court expressly ruled that the $800 monthly retention was in the nature of debt repayment, not support, and was dischargeable in bankruptcy. By that time, however, the value of Wife's unpaid debt to Husband was

determined by the bankruptcy court to be $1,557.52.

At the hearing on the cross-motions for modification, the court heard testimony from the parties concerning their financial circumstances, and the court ruled that spousal support should be abated as of July 1, 1998. The court also found that Husband had abandoned his request for visitation.[3] Accordingly, the previous order for no visitation was continued by the court without change.[4]

As to the other issues, the court ordered child support increased pursuant to the statewide guidelines effective January, 1998. The court awarded the income tax exemption to Husband for the years 1993 to 1997, but awarded the

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[3]The trial court initially ordered Husband and the children to undergo a psychological evaluation for purposes of determining whether visitation should be ordered and recommended that the two children participate in therapy. Although Husband participated in some of the planned sessions with the evaluator, he eventually declined to participate further and abandoned his requests for visitation after the two children displayed considerable resistance to the idea.

[4]The court noted, with regret, that the couple's two children were hopelessly alienated from their father, and the court commented that Wife was in part to blame for not encouraging contact between Husband and the children.

exemption to Wife for 1998 and years thereafter. The court found that Husband owed Wife no payments for spousal support arrearages. And the court ordered each party to bear his or her own attorneys fees.

DISCUSSION

I. SPOUSAL SUPPORT

Wife's principal contention on appeal is that once she filed for bankruptcy in 1996 Husband was no longer entitled to retain the $800 per month for the community debt and Husband should have been ordered to pay the arrearages to her. Wife's reasoning is unfathomable. Wife's 1996 bankruptcy did not involve Wife's debt to Husband for the community debts. That debt was not discharged until June 1998, upon the reopening of Wife's bankruptcy. Spousal support was abated as of July 1, 1998, due to the significant change if Wife's earnings. Thus, even if the bankruptcy discharge of Wife's debt somehow entitled her to the $800, that entitlement ended as soon as it arose.

In any event, under the terms of the 1994 order, Husband's obligation for spousal support was limited to $100 per month even if the community debts were discharged. Faced with that order, Wife devotes most of her brief to challenging the 1994 order. She contends that the order erroneously characterized the $900 monthly award as spousal

support when in fact, as found by the bankruptcy court, $800 of the award was actually part of the division of the community debts. And by characterizing the $800 as spousal support, which is not dischargeable in bankruptcy, the order effectively precluded Wife from filing for bankruptcy. Further, Wife agrees that by specifying that Wife's future support needs were limited to $100 per month even if the debts were discharged, the order was an improper attempt to make the spousal support order nonmodifiable by eliminating bankruptcy as a changed circumstance that could justify modification. Finally, Wife asserts that the award of $100 per month in spousal support was woefully unfair in light of her status as an unemployed student and Husband's high earnings as a physician.

As Wife concedes, no appeal was taken from the 1994 order; the order has long been final. Wife, however, relies on the rule that an order made in excess of the court's jurisdiction is void and may be attacked at any time. (E.g., *Vasquez v. Vasquez* (1952) 109 Cal.App.2d 280, [on default judgment trial court awarded entire community property to petitioner].) She argues that insofar as the 1994 order precluded her from taking advantage of the protections of the bankruptcy laws, the order violated public policy and the trial court thereby exceeded its jurisdiction in making such an

order. At the same time, however, Wife acknowledges that the trial court had jurisdiction to award spousal support and divide the community debts. She urges this court to "resect" from the 1994 order the $800 "step-down" as a remedy in excess of the trial court's jurisdiction.

We cannot review the 1994 order. First, Wife has not made clear to us exactly how the order prevented her from filing for bankruptcy, and, indeed, Wife's assertion is belied by the fact that Wife actually succeeded in discharging her unpaid obligation to Husband for the community debts. In any event, even if we were to conclude that the 1994 order violated the public policy embodied in the bankruptcy laws allowing debtors to make a fresh start, a violation of public policy is not equivalent to a jurisdictional error so as to permit a collateral attack on a final judgment (*Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 950-951 [erroneous reduction of child support based on children's independent assets, although against public policy, not a jurisdictional error].) The errors of which Wife complains constitute, at most, a mistaken application of law, not an act beyond the power of the court. Consequently, the 1994 judgment cannot be collaterally attacked even if it was erroneous. (*Ibid.*; see also *Moffat v. Moffat* (1980) 27 Cal.3d 645, 657-658

[erroneous abatement of child and spousal support as remedy for refusal to permit visitation].)

In the present case, the trial court concluded upon Wife's motion for modification that the 1994 order could not be reopened. We agree with that ruling, and we will not address Wife's various challenges to the 1994 order.

II. TAX EXEMPTION

Pursuant to the Internal Revenue Code, the custodial parent is entitled to claim a dependency exemption unless the custodial parent signs a written waiver. (26 U.S.C. §152(e).) However, the state courts retain discretion to allocate the exemption by ordering the custodial parent to execute the waiver. (*Monterey County v. Cornejo* (1991) 53 Cal.3d 1271, 1277-1280.) Practical considerations underlie the allocation: '"[I]ncome tax exemptions are valuable only to persons with income, and up to a certain point, the higher income the more valuable exemptions become because of the progressively of the federal income tax.' [Citations.] The respective incomes of the parents may be such that if the noncustodial parent is allowed the exemption, his or her income tax may be reduced by an amount *greater* than the increase in the tax liability of the custodial parent deprived of the exemption. This circumstance will obtain where, as is often the case, the

custodial parent's adjusted gross income is less than the adjusted gross income of the noncustodial parent. [Citation.]" (*Id.* at p. 1280.) In such a case "it is eminently reasonable for a trial court to allocate the dependency exemption to the noncustodial parent in the higher income bracket, and increase the child support payments to offset the cash value of the exemption." (*Ibid.*)

In the present case, the 1994 order from Humboldt County allocated the tax exemption to Husband, the noncustodial parent.[5] At the June 1998 hearing on the cross-motions for modification, Wife requested that the tax exemption be awarded to her. Counsel for Wife asserted that the benefit of the tax exemption is phased out at $189,000 and Husband made over $200,000. Counsel for Wife also complained that Husband had gone ahead and taken the tax exemption for 1997 knowing that the tax exemption was in

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[5]It appears that Husband never actually took the tax exemption for the years 1993 to 1996 because Wife never signed the waiver forms. At the June 1998 hearing on the cross-motions for modification, counsel for Husband informed the court that a request had been made to Wife's attorney to have Wife sign the releases. The court then ordered Wife to do so. In so ordering, the court acknowledged that the parties may need to file amended returns for past years.

dispute. Husband denied the charge, contending that he relied upon the 1994 order and was unaware that the tax exemption was disputed. The trial court, too, expressed surprise that Wife was seeking the tax exemption. The court found there was nothing in Wife's motion papers to give Husband notice that the tax exemption was in dispute.

At the conclusion of the hearing, the trial court *granted* Wife's request for the tax exemptions for tax years 1998 onward. The court affirmed Husband's entitlement to the exemption for 1993 to 1996 but took under submission the issue of Wife's entitlement to the tax exemption for 1997 after a review of Husband's 1997 tax return. In supplemental briefing, Wife argued that Husband would actually gain no tax advantage from the exemption on account of his high income and that she, in contrast, would save $7,000 in taxes. Husband, on the other hand, asserted that his accountant had advised him he would have to pay an additional $1,978 in taxes without the exemption. The trial court awarded the tax exemption to Husband for 1993 to 1997.

Wife now complains that the court should not have allowed Husband to retain the tax exemption for 1997. She contends that Husband purposefully delayed submitting his tax return to Wife and to the court until July 1998 and thereby "surreptitiously" took the tax exemption knowing the

trial court had the dispute before it. She further argues that Husband's bald assertion that the tax exemption would benefit him should not have been accepted as it was unsubstantiated, while Wife, in contrast, presented "expert" evidence that the tax exemption does not benefit taxpayers with very high income.

We uphold the trial court's ruling. The decision to allocate the tax exemption is a discretionary decision (*Monterey County v. Cornejo, supra*, 53 Cal.3d at p. 1280), and the trial court acted within the bounds of its discretion in deciding to modify the allocation of the tax exemption only for future years, leaving the allocation in place for tax years already past.

III. ATTORNEY FEES

In her motion for modification, Wife asked for an award of the attorneys fees incurred in the cross-motions for modification of child support, spousal support, and determination of spousal support arrearages. She pointed out that she had additionally been forced to pay for legal services covering the evaluation proceedings on Husband's request for visitation, which he later abandoned, and the reopened bankruptcy proceedings in which Husband objected to Wife's discharge of her debt to him.

Husband opposed to Wife's request for attorney fees and

testified that he had spent over $150,000 in attorney fees related to the family law proceedings. The trial court declined to award any attorney fees, leaving each party to bear his or her own attorney fees. Wife's request for reconsideration of attorney fees was denied.

A. *Need-Based Award*

In the proceedings below, Wife relied on Family Code[6] section 2030, which authorizes an award of postjudgment attorney fees when fees are "reasonably necessary to maintain or defend any subsequent proceedings." (§2030, subd. (c).) On appeal, Wife has expanded the legal foundations for her request, pointing to the additional statutory bases for attorney fee awards in sections 3652 and 3557.

Section 2030 is explicated in section 2032, which directs the trial court to make an award that is "just and reasonable under the *relative* circumstances of the respective parties." (Italics added.) Section 2032 instructs the court to take into consideration the circumstances of the respective parties to determine their needs for the award so as to enable each party to have sufficient financial resources to present the party's case adequately. A party's need to an award of attorney fees

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[6]All undesignated section references are to Family Code.

is not determined by a fixed numerical standard. (*In Re Marriage of O'Connor* (1997) 59 Cal.App.4th 877,883.) Section 2032 provides that a party's resources from which to pay the party's own attorney fees are only one fact for the court to consider and do not bar an order that the other party pay the attorney fees requested. That is, a party may have the funds with which to pay her own attorney fees but nevertheless demonstrate a relative need in light of the disparity in the parties' respective circumstances. (*In Re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1167.)

The trial court here declined to award attorney fees under section 2030, finding that despite the disparity in actual earnings figures, Wife was actually better off financially than Husband. The court explained as follows: "When we weigh all the factors, Doctor Lawson should be living a really luxurious life, but I truly doubt that he is because of his tremendous number of moves and the number of bills that he has, and the number of dependents he has." The court made similar findings in deciding to make the child support increases retroactive only to January 1998: "[A]t this stage of their situation, Mrs. Lawson has much more per capita income than he does." "I think Mrs. Lawson has found herself in much better circumstances since her divorce. I

mean, I know she's had years of struggle. Doctor Lawson is probably where he was when they separated, still struggling financially. He's got more dependents than ever, and I don't know that he will ever find himself out of...these enormous expenses that he seems to continually have."

The trial court found for purposes of calculating child support for 1998 that Husband's income was $15,751 per month, based on evidence that Husband, during the previous year, had earned $189,015 as of the January 1999 hearing.[7] The court further found that Wife's gross income was $6,500 per month. This finding is supported by the evidence that Wife earned $78,000 in 1998.[8] Husband had remarried and

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[7]Wife takes issue with this finding, pointing out that Husband's tax return for 1997, submitted after the hearing but while the matter was under submission, showed earnings of $239,000 in 1997. However, the child support increases took effect January 1, 1998, and any attorney fees award would be based on a party's present ability to pay; therefore, 1997 income is not relevant.

[8]In her briefs, Wife insists that she earned only $52,000. Indeed, she testified at the June 1998 hearing that she earned $52,780 in 1997 and anticipated making the same amount in 1998. By the time of the hearing in January 1999, however, when the trial court actually calculated the amount of child support using the statewide guidelines, Wife's counsel gave the income

had a new child as well as a stepson and two grandchildren in his household. One of the grandchildren had very high medical expenses. The trial court explained that with her real estate commissions ($6,500) plus child support ($3,000), Wife's income is $9,500 per month; Husband, on the other hand, has multiple dependents and must pay child support to Wife as well.

The court also noted Husband's testimony that he had already spent over $100,000 in attorney fees related to the proceedings. Wife argues that this testimony should have been rejected as there is no independent evidence to support it. Indeed, Husband was ordered to pay Wife only $5,000 for her attorney fees in those proceedings about $28,000. Husband's 1999 Income and Expense Declaration showed a payment of $4,000 to his attorney for the present proceedings with outstanding fees of $2,000. Husband had also discharged in bankruptcy $4,000 owed as attorney fees. Yet, despite the fact that Husband's testimony was a gross exaggeration, we nevertheless conclude that the amount of Husband's past payments of attorney fees was inconsequential to the trial court's decision regarding the parties' current

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figure as $78,000. The court recognized that as gross self-employment income.

relative financial circumstances.

The trial court has broad discretion in deciding what is just and reasonable under all the circumstances, considering the parties' needs and ability to pay. (*In Re Marriage of O'Connor, supra*, 59 Cal.App.4th at p. 884; *In Re Marriage of Drake, supra*, 53 Cal.App.4th at p. 1166-1167; *In Re Marriage of Czapar* (1991) 232 Cal.App.3d 1308, 1318-1319.) We cannot find an abuse of discretion in the trial court's implied finding that Wife had no relative need for the attorney fees award.

B. *Prevailing Party*

Citing sections 3557 and 3652 for the first time on appeal, Wife argues that she should have been awarded attorney fees as the prevailing party on the request for modification of child support and for enforcement of Husband's obligation to pay the children's medical expenses.

Section 3557 allows an award of attorney fees in a proceeding to *enforce* a child support order. An order for child support has been construed to cover an order for medical expenses only. (See *von Beroldingen v. Beroldingen* (1962) 210 Cal.App.2d 1, 10.) Wife reasons that she is entitled to attorney fees because she successfully obtained an order compelling Husband to pay one-half of the children's

medical bills left uncovered by health insurance. What Wife overlooks, however, is that the trial court found that no prior order existed concerning payment of medical expenses. Consequently, the court's order here cannot be construed as an order for enforcement of a prior support order.

In any event, section 3557, like section 2030, requires the trial court to determine the parties' respective needs and ability to pay. Thus, even if the trial court had considered Wife's request in light of section 3557, the court's determination of the relative disparity would not have resulted in an award of attorney fees to Wife.

Section 3652 allows an award of attorney fees to the prevailing party in a proceeding to modify or terminate child support. Again, however, the trial court is granted broad discretion to determine the prevailing party's need for an attorney fees award in light of all the circumstances. There is no requirement that attorney fees be awarded to the prevailing party. (*In Re Marriage of Hublou* (1991) 231 Cal.App.3d 956, 966.)

C. *Sanctions*

In briefing on the issues taken under submission following the June 1998 hearing, Wife asked for sanctions pursuant to section 271 on account of Husband's failure to

produce his 1997 tax return until after the hearing and Husband's production of self-serving computer sheets regarding his repayments of the community debts. The trial court denied the request. Wife now repeats her argument almost verbatim on appeal.

The argument is meritless. Wife was in no way harmed by the late production of the 1997 tax return or by the purported inaccuracies in the listing of the debt payments. As we will discuss in part IV (B) below, Husband had no obligation to provide an accounting of his payments of the community debts. The contents of the computer spread sheets were irrelevant. As for the tax return, it was submitted to the court along with the supplemental briefing and was therefore before the court for purposes of calculating child support and allocating the tax exemption. Wife makes no cogent argument as to how the delayed submission of the 1997 tax return resulted in any prejudice.

Wife also contends she is entitled, pursuant to section 271, to attorney fees that she incurred as a result of opposing Husband's motion for modification of the visitation order, which Husband ultimately abandoned. The trial court rejected this request based on the finding that the motion was brought in good faith; the court implied in its comments that it was not unreasonable for Husband to abandon the motion

once he learned the intensity of the children's alienation from him. The court further observed that the bulk of attorney fees was not incurred in proceeding through the custody evaluation process but in addressing the financial issues.

IV. OTHER ASSIGNMENTS OF ERROR

At the beginning of her opening brief, Wife lists five "assignments of error", but in the body of her brief she discusses only two of them - the invalidity of the 1994 order and the denial of attorney fees.[9]

A. *Child Support*

Wife's request for modification of the support orders was filed in October 1997. The trial court increased the child support from $2,400 to $2,525 pursuant to the statewide guidelines as of January 1, 1998, and increased it to $2,598 or $2,763, if Husband purchased a home, effective February 1, 1999.[10] Wife did not dispute below the computation of the

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[9]As a sixth item, Wife lists "Such other and further assignments of error as may be raised during the briefing of the above issues." The body of the brief additionally discusses the award of the 1997 tax exemption and the discovery violations.

[10]Later, by stipulation, the amount was modified to $2,261 from May 1 to May 10, 1999 (the graduation of the older child) and then $1,377 until the younger child completes high school.

child support amount. Nor does she challenge the amount on appeal. Rather, Wife contends, as she did below, that the increase should have been made effective October 7, 1997, the date of her modification request.

The trial court expressly declined to modify the child support order prior to January 1998, reasoning that although Husband earned a high income he was a poor manager of his money, having made several major moves and accumulated heavy debts. The court explained, "I believe the Court has discretion to set the effective date."

Wife asserts that the trial court was statutorily mandated to award support in accordance with the statewide guidelines (§4052) and by refusing to make the chid support award fully retroactive, the court contravened the statute for the last three months of 1997.

We cannot agree. The mandate of section 4052 was fulfilled by the 1994 child support award of $2,400 made by the Humboldt County Superior Court. Wife moved to modify that award based upon Husband's increased earnings, and the trial court granted Wife's request. An order for modification of support may be retroactive to the date of filling the motion *or to any subsequent date*. (§3653). The trial court's decision to fix the effective date of a retroactive modification is a discretionary, equitable decision to be made in light of

the economic needs and abilities of the parties. (*In Re Marriage of Jacobs* (1981) 126 Cal.App.3d 832, 835-836.) The trial court duly considered the respective financial circumstances of the parties in making its decisions on retroactivity. We find no abuse of discretion.

B. *Accounting*

Wife contends the trial court erred in failing to require an accounting from Husband demonstrating the actual amount he paid toward the community debts, both from his own funds and from the $800 monthly retention from Wife. This contention is meritless.

There was no reason for an accounting. Husband's obligation to pay the community debts was discharged in bankruptcy, and Wife's obligation to reimburse Husband was likewise discharged. The obvious argument behind Wife's request for an accounting is that Husband should not have been allowed to retain the $800 per month from the spousal support award. This argument is merely a restatement of Wife's attack on the 1994 order. For the reasons discussed in part I above, Wife is precluded from a collateral attack on that order.

In any event, Wife relies on section 721, which provides that spouses stand in a fiduciary relationship to each other

and may be required to give an accounting of transactions involving the community property. Here, however, Husband and Wife were no longer married and no longer owed fiduciary obligations to each other when the community debts were divided. Once allocated in the divorce decree, the debts were no longer community property.

C. *Testimony*

Wife asserts that she was denied the opportunity to testify at the hearing held on the modification requests. This assertion, too, is groundless.

At the commencement of the hearing both parties agreed to proceed by way of offer of proof with limited testimony. Husband then testified to clarify his abandonment of his request for visitation. He also testified about his financial circumstances, and Wife, too, testified about her income. At the end of the hearing the trial court ruled on some of the issues but took others under submission. The trial court took judicial notice of the bankruptcy proceedings and invited written briefing on the issues of spousal support arrearages, attorney fees, and the income tax exemption for 1997. When Wife's counsel insisted that further testimony was required, the court denied the request, finding that oral testimony was unnecessary on the remaining issues. The court invited counsel to submit additional documentary evidence on the

submitted issues. The court announced its ruling at the subsequent hearing in January 1999, at which time the court reviewed with both counsel the particular details used to apply the statewide guidelines for child support.

The trial court committed no error in declining to hear further testimony from Wife. The matter before the court was a law and motion matter, which may properly be heard on declarations and documentary evidence without testimony. (Rule 323(a), Cal. Rules of Court.) The decision to take oral testimony on postjudgment family law motions rests within the discretion of the court. (*In Re Marriage of Biderman* (1992) 5 Cal.App.4th 409, 412). Moreover, proceeding by way of offer of proof has been recognized as an efficient method in family law cases (*In Re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1059, fn.3), and Wife, through her counsel, expressly agreed to that procedure.

In any event, Wife has not demonstrated how her omitted testimony would have affected any of the issues. The trial court had before it the income and expense declarations of both parties and Husband's tax returns for 1992 to 1997. The court also admitted into evidence the depositions of both parties detailing their financial circumstances.

Wife complains that she was not allowed to testify

concerning Husband's abuse of the children to show that Husband was largely responsible for the children's refusal to visit. Yet, the trial court made no change in child custody or visitation. Wife also contends she was not allowed to testify about her financial circumstances at the time of the 1994 order. She conceded, however, that such testimony was given at her deposition, and that deposition was admitted into evidence at the hearing. Further, the court made it clear that such testimony would not be relevant unless Wife was successful in setting aside the 1994 order. Finally, Wife contends she was not allowed to present evidence on the amount Husband actually paid toward the community debts. As we discussed in part IV(B) above, Husband was not required to account for his payments on the debts.

In short, the trial court acted well within the bounds of its discretion to decide the issues without further oral testimony.

DISPOSITION

The orders appealed from are affirmed. Costs are awarded to respondent.

RIVERA, J.*

We concur.

JONES, P.J.

STEVENS, J.

*Judge of the Contra Costa Superior Court, assigned by Chief Justice pursuant to article VI, section 6 of the California Constitution.

Court of Appeal, First Appellate District, Division Five
No. A088191
S092937

IN THE SUPREME COURT OF CALIFORNIA

En Banc

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IN RE THE MARRIAGE OF ROBERT AND PATRICIA LAWSON.

ROBERT LAWSON, Respondent

v.

PATRICIA LAWSON, Appellant.

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Petition for Review DENIED.

GEORGE

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Chief Justice